Supreme Court of the United States

OCTOBER TERM, 1944

No.

ÆTNA INSURANCE COMPANY, et al.,
Plaintiffs-Petitioners,

against

HENRY DE BOS SONS COMPANY and HARTFORD FIRE INSURANCE COMPANY,
Defendants-Respondents.

BRIEF IN SUPPORT OF PETITION

FIRST POINT

The decision below is in conflict with the *Augusta-Detroit* decision in the Fourth Circuit (5 F. 2nd 773).

The fact situation in the *Augusta-Detroit* case was almost identical with that in the present case. Through her sole negligence, the steamer *Augusta* sank her sister-ship, the barge *Detroit*, and damaged the *Capitaine de Beauchamp*, owned by a third party. Thus the two cases differed only in the immaterial respect that the outside vessel, the *Beauchamp*, was free from fault, whereas in the present case, the *Segundo* was partly at fault.

As in the present case, the barge was not fully insured by the barge policies and the amount the barge under-

writers paid ($25,932) covered only part of the barge loss ($100,000). The barge owner and her underwriters then claimed for the entire barge loss under the sister-ship clause of the steamer's policies. The Arbitrator allowed only the uninsured residue of the barge loss ($74,068)—comparable to the amount paid here under the tug's sister-ship clause.

The Arbitrator held that the rights under the *Augusta's* sister-ship clause related to a subject-matter—the steamer—wholly different from the subject-matter of the barge insurance and were personal to the *Augusta's* owners; that neither the underwriters on the barge, nor the barge owner in their interest, could invoke any rights under the sister-ship clause of the steamer policies; that the sister-ship underwriters were liable only for that part of the barge loss which was not covered by the barge insurance, 1930 A. M. C. 1035, 1037.

The Fourth Circuit agreed with this view, quoting at length from the Arbitrator's decision "because of the manifest strength and apparent justice of the same" (5 F. (2d) 773, 776). It found the reasoning of the Arbitrator "entirely conclusive" as to the effect of the sister-ship clause (p. 776), and it said "we fully concur" with the District Court (which had also agreed with the Arbitrator) that "the awards as made were right" (p. 777).

The result reached by the Fourth Circuit logically flows as a legal consequence of the common ownership. The owner of the vessel at fault could not be liable to himself as owner of the innocent vessel. *Simpson & Co.* v. *Thomson*, L. R. 3 A. C. 279, 288. It makes no difference that any recovery that the owner might make (if he could sue himself) would be for the benefit of his underwriters. *Globe*

& Rutgers Fire Insurance Co. v. *Hines*, 273 Fed. 774, cert. den. 257 U. S. 643:

> "There can be no right of subrogation, if the ship which is insured and the ship which commits the injury are owned by the same party" (p. 777).

Because of the common ownership, therefore, Hartford, as insurer of DuBois' scow, could have no subrogation rights against Dubois, as owner of the tug, or against those who insured Dubois against liability on the part of the tug.

The Second Circuit attached importance to the fact that DuBois' scow was not at fault (R. 40). That would be of importance if the scow owner could sue the tug owner, but the common ownership prevented such suit. The scow's innocence or fault has no bearing on the scow underwriter's liability to reimburse DuBois for his scow damages, and, in view of the common ownership, no bearing on the question of subrogation.

The history of the sister-ship clause (quoted, pp. 4-5) makes clear that its purpose was not to afford an overlapping insurance, but to indemnify the owner of the vessel insured by the sister-ship clause, where not otherwise protected. The origin of the clause lay in the desire to protect the common owner in respect of detention losses. Detention is not covered by hull policies and, although both vessels might be insured under collision clauses, common ownership would prevent the owner getting detention reimbursement under the collision clause—he could not be liable, as owner of the vessel at fault, to himself, as owner of the blameless vessel. The *Augusta-Detroit*, 1923 A. M. C., at p. 819; II Arnould on Marine Insurance (12 Ed.), Section 795, note (r) at p. 1056.

Instead of applying the "principles" of the collision clause in the interest of the common owner by affording him needed protection, the Second Circuit has construed the sister-ship clause as, in effect, requiring a disregard of the common ownership, even as between the tug underwriters and a stranger, the scow underwriter. This would lead to results inequitable to the assured, as an illustration will show.

If the tug underwriters' liability were determined as though there were no common ownership, almost nothing would be recoverable under the sister-ship clause if the tug were lost in the collision, for the tug's liability would be practically nil, because of the limitation of liability statute (46 U. S. Code, Sec. 183, makes the limit of liability in the absence of privity, the value of the vessel *after* the disaster, plus any pending freight). In *The Augusta-Detroit*, however, the sister-ship clause underwriters were required to pay on the basis of *Detroit's* entire uninsured damages, notwithstanding the *Augusta's* limitation value was less.*

The Second Circuit in nowise questioned the soundness of the *Augusta-Detroit* decision. Indeed, it cited it as in accord with its own decision, saying that the Fourth Circuit had held:

> "that the insurer of a towing vessel [the *Augusta*] at fault for collision damages to a vessel under common ownership could not, in the absence of policy provi-

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* Notwithstanding the *Augusta's* limitation value was about $67,000 in which the *Beauchamp* was entitled to share, the *Augusta's* sister-ship clause underwriters were required to pay the *Detroit's* owner on the basis of *Detroit's* uninsured damages of $74,068. The amount actually paid was somewhat less than this, because the *Augusta* was under-insured by about 6½%, making the actual payments under the sister-ship clause $69,252.59—and thus much in excess of what the *Detroit* could have recovered from the *Augusta* had there been no common ownership. 1930 A. M. C., at pp. 1036-8.

> sions to that effect, diminish its liability under collision and sister ship clauses for that loss by the amount of hull insurance paid on a policy on the vessel damaged [the *Detroit*]" (R. 43).

Actually, however, the liability of the *Augusta's* underwriters was diminished by the amount of the hull insurance paid on the *Detroit*: the *Augusta* underwriters were held liable not for the entire loss on the *Detroit*, but only for $74,068, the difference between the entire loss ($100,000) and the amount covered by the *Detroit's* policies ($25,932). The Second Circuit recognized that such was the fact, when it said that *The Augusta-Detroit* had determined that:

> "such [*Augusta's*] underwriters were bound under the sister ship clause to pay for the loss of the *Detroit* to the extent that the owner had not been compensated for it out of the proceeds of the *Detroit* policy" (R. 42).

In its attempt to resolve the inconsistency between the two foregoing statements, the Court fell into confusion when it stated:

> "Though the underwriters had in effect thus been given credit in fixing their liability under the *Augusta* policy for what *they* [italics supplied] had already paid on the *Detroit* policy * * *" (R. 42),

for it was not the *Augusta's* underwriters who had paid on the *Detroit* policy, but the *Detroit's* underwriters.

Although the *Detroit's* underwriters were also on the *Augusta* policies, they comprised only about one-sixth in amount of the *Augusta's* underwriters, as the record in the Fourth Circuit shows (Transcript of Record, pp. 51-2). The Fourth Circuit decision did not, and could not, turn upon the ground that the two sets of underwriters were the same.

As to the Loan Receipt

The Second Circuit said it was unnecessary for it to decide whether the scow underwriter could claim subrogation as against the tug underwriters, for (said the Court):

> " * * * the defendants have in the loan receipt given effect to the equivalent of a right of subrogation * * * " (R. 41).

Subrogation is a legal right arising by operation of law. *The Augusta-Detroit* held that no subrogation rights arose as against the sister-ship clause underwriters. How the loan receipt, evidencing a transaction to which the tug underwriters were not parties, could create a right of subrogation where none existed, or could give "effect to the equivalent of a right of subrogation"—when no such right existed, the Court made no attempt to explain.

Loan receipts have been recognized as a method of protecting underwriters' subrogation rights, but never of enlarging them. A loan receipt is appropriate where an underwriter's liability is *contingent* only and it is desired to put the assured in funds yet not have the advance construed as a payment. But where the underwriter's obligation is unconditional, as was the scow underwriter's obligation here, the loan receipt accomplished nothing. In *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, cited by the Second Circuit (R. 39), the underwriter was only *conditionally* liable—the policy coverage was conditioned on non-liability of the carrier, and the underwriter could properly stipulate that his advance should not be considered a payment. That distinction was recognized in *China Fire Insurance Co.* v. *Davis*, 50 F. (2d) 389, cert. den. 284 U. S. 658, where the Court said:

"In that case the defendant must succeed, because, although the plaintiff used a form of receipt, which made the payment a loan to the shipper, there was, as we have said, no provision in the policies, as in Luckenbach v. W. J. McCahan Sugar Co., 248 U. S. 139, 39 S. Ct. 53, 63 L. Ed. 170, 1 A. L. R. 1522, by which the underwriter became liable only to the extent that the carrier was not" (p. 391).

SECOND POINT

The decision below is in conflict with this Court's decision in *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527.

There was no dispute that the scow policy covered the damage to the scow and that under that policy DuBois could recover his scow damage from the scow underwriter up to the policy limit. There was nothing in the scow policy that freed the scow underwriter from liability to the scow owner in case of other insurance that might cover the loss.

If the Circuit Court of Appeals was correct in rejecting our first contention and holding that the tug's sister-ship clause covered all the damage to the scow and not merely the uninsured scow damage, then DuBois had two insurances to which he might look to cover his loss.

In such case, the law does not leave the matter to the whim of the assured to decide upon which of the two sets of underwriters he will put the loss. The rule is that the loss must be borne by the two sets of underwriters in proportion to their respective commitments. *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527. The test for applying this rule, as the *Home Insurance Co.* case shows, is not whether the coverage of the two different policies is the same, but whether, under the circumstances

of the particular case, the loss falls within the coverage of both policies. This rule for apportionment of the loss cannot be avoided by the device of the loan receipt. *Dixey* v. *Federal Compress & Warehouse Co.*, 140 F. (2d) 820, 821; *Davis Yarn Co.* v. *Brooklyn Yarn Dye Co.*, 293 N. Y. 236, 242.

The apportionment rule was applied by the arbitrator in *The Industry-Commerce Arbitration*, 1939 A. M. C. 717, in a situation similar to the present. The arbitrator divided the loss between the sister-ship clause underwriters who insured the vessel at fault, and the underwriters on the innocent vessel belonging to the same owner.

Whatever the situation might be in a suit by DuBois in his own interest against the tug underwriters, beneficially this controversy is solely between the two sets of underwriters and all the parties in interest are parties to the present suit. The apportionment rule can therefore be applied in this suit.

CONCLUSION

Because of the above conflict in the decisions, involving a novel question of marine insurance law of general importance, a writ of *certiorari* should be granted in order that the questions involved may be finally determined.

New York, N. Y., December, 1944.

Respectfully submitted,

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